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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. HENRY ALEXANDER CUELLAR, Defendant and Appellant.	B205867 (Los Angeles County Super. Ct. No. BA300447)

APPEAL from a judgment of Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Henry Alexander Cuellar appeals from the judgment entered after his conviction by a jury on one count of first degree murder (Pen. Code, § 187, subd. (a))[1] with true findings on multiple firearm allegations as to each count (§ 12022.53, subds. (b), (c) & (d)). Cuellar was sentenced to an aggregate state prison term of 50 years to life. He contends the evidence is insufficient to support the finding the murder was willful, deliberate and premeditated. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of March 21, 2006, then 19-year-old Cuellar grabbed a 12-year-old boy and pushed him up against the wall of a Laundromat on Sixth Avenue near Pico Boulevard. The boy looked frightened. Also present were several other young boys and Cuellar's friend and girlfriend.

Eddy Monroy pulled up outside the Laundromat on Sixth Avenue and got out of his car. He approached Cuellar and raised his arms, with his palms open. There was nothing in his hands. Cuellar turned to face Monroy and lifted his shirt, exposing a gun in his waistband. As Monroy started to return to his car, Cuellar pulled out the gun, moved to the front of the car and pointed the gun at Monroy. Monroy immediately fled on foot down the sidewalk towards Pico Boulevard. Cuellar stepped back onto the sidewalk, aimed the gun at Monroy and fired a shot at him. Monroy ran into the Laundromat parking lot, pursued by Cuellar who intercepted Monroy at the back door, confronted him face to face, and fired a second shot. Monroy collapsed, and Cuellar ran away towards Pico Boulevard.

Arriving police officers found Monroy on the ground; his face covered with blood. A trail of blood led from the parking lot to Sixth Avenue. Monroy died as a result of a gunshot wound to his left arm and chest.

On May 22, 2006, Cuellar was taken into custody at the San Ysidro point of entry from Mexico. Following his arrest, Cuellar was advised of and waived his constitutional

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[1] Statutory references are to the Penal Code.

rights to remain silent and to the presence of an attorney (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]), and spoke with Los Angeles Police Officer Teodoro Urena. During the interview, Cuellar gave different versions of what had occurred on March 21, 2006.

In his first version, Cuellar stated he and two friends intervened to stop three men from taking a boy's bicycle. Cellar told Officer Urena he asked one of them, "Where are you from?" The man responded by pulling out a gun, and Cuellar and his friends fled. Officer Urena followed up, "So you asked him where he was from?" Cuellar answered, "Nah, nothing like that." Cuellar admitted he belonged to the MLK (Maryland Kriminals) gang, and his moniker was Casper.

In his second version, Cuellar claimed the man with the gun fired two shots at Cuellar, but missed, prompting Cuellar to shoot his own gun in self defense while running away. Cuellar did not know whether the shots struck the man.[2]

Officer Urena testified, in his experience as a gang investigator, a gang member who demands to know where someone is from wants to identify and threaten a rival gang member. Cuellar did not testify at trial. The defense called an expert witness to testify on the effects of methamphetamine use. In particular, the expert testified Monroy's blood contained levels of methamphetamine indicative of recent use often associated with violent behavior.

DISCUSSION

1. *Standard of Review*

In reviewing a challenge to the sufficiency of the evidence, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432;

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[2] Jurors saw a videotape and were provided with a transcript of the interview.

see *People v. Staten* (2000) 24 Cal.4th 434, 460; *People v. Hayes* (1990) 52 Cal.3d 577, 631.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime present beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*Bolin*, at p. 331.)

"Substantial evidence" in this context means "evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849 ["'"[w]hen the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt"'"].) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

2. Substantial Evidence Supports the Jury's Finding the Murder Was Willful, Deliberate and Premeditated

First degree murder requires a finding of premeditation and deliberation. (§§ 187, subd. (a), 189.) "'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."'" (*People v. Young* (2005) 34 Cal.4th 1149, 1183.)

In his lone challenge on appeal, Cuellar asserts the jury lacked sufficient evidence for its finding the murder was willful, deliberate and premeditated. He concedes the jury was properly instructed (see CALJIC Nos. 8.20),[3] but argues there was no evidence he acted with either premeditation or deliberation.

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*) the Supreme Court articulated "guidelines to aid reviewing courts in analyzing the sufficiency of the evidence to sustain findings of premeditation and deliberation." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 (*Perez*).) The guidelines are descriptive, not normative (see *People v. Thomas* (1992) 2 Cal.4th 489, 516-517) and "are not a *sine qua non* to finding first degree premeditated murder, nor are they exclusive." (*Perez*, at p. 1125.)

From the cases surveyed in *Anderson*, the Court identified three categories of evidence pertinent to the determination of premeditation and deliberation: "(1) facts about how and what defendant did *prior* to the actual killing which show that the

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[3] CALJIC No. 8.20, as given here, provides: "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree. The word 'willful,' as used in this instruction, means intentional. The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word 'premeditated' means considered beforehand. If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberative – deliberate and premeditated – should be 'deliberate and premeditated.' The time will vary with different individuals and under varying circumstances. The true test is not in the duration of time but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill."

defendant was engaged in activity directed toward, and explicable as intended to result in, the killing -- what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Anderson, supra,* 70 Cal.2d at pp. 26-27.) Regarding these categories the *Anderson* Court stated, "Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*Id.* at p. 27.) The Court concluded the evidence against Anderson, who had stabbed the 10-year-old child of the family he lived with more than 60 times, was insufficient to demonstrate the murder was premeditated or deliberate when there were no eyewitnesses to the crime and no explanation of what led up to the murder. (See *Perez, supra,* 2 Cal.4th at p. 1126.)

Citing *Anderson*, Cuellar contends the circumstances of the murder here show the killing was a rash and impulsive reaction against Monroy for having interfered with his handling of a 12-year-old boy. Cuellar contends there was no evidence of planning, because Monroy had arrived at the scene shortly before the shooting. Cuellar argues there was no evidence he had any prior contacts with Monroy from which a motive to kill could be inferred. Cuellar asserts the only evidence relating to the manner of the offense was that he fired two shots at Monroy, hitting him only once, before fleeing, which suggests the killing was unconsidered and hastily executed rather than calculated.

Following the *Anderson* guidelines, we conclude the jury could reasonably have inferred from the evidence that Monroy's murder was premeditated and deliberate. Although Cuellar claims the shooting of Monroy was spontaneous, the evidence showed Cuellar deliberately followed an unarmed and retreating Monroy to the sidewalk. Once there, rather than allowing Monroy to drive away, Cuellar pulled out his gun and pointed it at Monroy, who turned and ran. Rather than allowing Monroy to flee, Cuellar remained on the sidewalk, aimed his gun and shot Monroy once. Rather than risk the possibility the wound was not fatal, Cuellar pursued Monroy into the parking lot and shot him again at close range. We agree with the People that although Monroy initiated the encounter, Cuellar controlled how it unfolded to ensure Monroy's death.

As for motive, whether Cuellar knew Monroy or had prior contacts with him is beside the point. A self-identified gang member, Cuellar clearly did not like being challenged in front of a group of people, including young boys, about his conduct towards one of them. With respect to the manner of the killing, the firing of two shots at separate times striking an unarmed victim is not compatible with random, indiscriminate conduct, but instead reflects an execution-style killing. This evidence, both directly and inferentially, falls within the three categories -- planning, motive and manner of killing -- described by *Anderson* as the type of evidence supportive of a jury's finding of deliberation and premeditation. We see no basis whatsoever to second-guess the jury's determination on this issue.

DISPOSITION

The judgment is affirmed.

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WOODS, Acting P.J.

We concur:

ZELON, J. **JACKSON, J.**